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ORIGINAL

January 25, 1993

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: Shellee F. Davis
BPH-911231MA
Channel 280A
Westerville, Ohio

Dear Ms. Searcy:

Enclosed for filing on behalf of Ohio Radio Associates, Inc.
are an original and four (4) copies of its supplement to petition

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JAN 25 1993
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In Re Application of:

SHELLEE F. DAVIS

File No. BPH-911231MA

Application for Construction
Permit for a New FM station,
Channel 280A, Westerville, Ohio

To: Chief, Audio Services
Division

SUPPLEMENT TO PETITION TO DENY AND DISMISS THE APPLICATION
OF SHELLEE F. DAVIS

Ohio Radio Associates, Inc. ("ORA"), by its attorneys, pursuant to Sections 73.3584(a) and 73.3587 of the Commission's Rules, hereby submits this supplement to its petition to deny and dismiss the application of Shellee F. Davis ("Davis"). On March 26, 1992, ORA filed a petition to deny and dismiss the application of Davis. On July 29, 1992, ORA filed a supplement to its petition to report the release of a new Commission decision which is relevant to the issues raised by ORA. It is filing this supplement to report the release of another new Commission decision which is relevant to the issues raised in the petition. In support of its supplement, ORA submits the following comments.

In its March 26, 1992, petition to deny and dismiss, ORA contended that the application of Davis must be dismissed with prejudice because she proposes a short-spacing of 6.84 km. In a comparative hearing, a short-spaced application cannot be considered if other applicants propose fully-spaced and technically suitable tower sites. See, e.g., North Texas Media, Inc. v. FCC,

778 F.2d 28, 34 (D.C. Cir. 1985). ORA and one other applicant in this proceeding propose such acceptable tower sites and no party has contested their availability and suitability.

The applications in this proceeding were filed for a channel which was allocated years ago. The allotment is now vacant because the license was deleted as a result of denial of the renewal application. Davis and the other short-spaced applicants are proposing the use of the existing tower of the previous licensee. That station was short-spaced to Station WTTF-FM, Tiffin, Ohio, but was "grandfathered" under Section 73.213. On September 11, 1992, Station WTTF-FM also filed an informal objection to Davis' attempt to perpetuate the short-spacing caused by the now deleted station.

In opposing ORA's petition, Davis has contended that she is entitled to the same "grandfathering" rights under Section 73.213 as the previous licensee. According to Davis, not only existing stations, but vacant allotments are "grandfathered" under Section 73.213. See, Davis oppositions, filed April 8, and August 11, 1992.

In John M. Salov, FCC 92-565, para. 17, released January 8, 1993, the Commission directly addressed this issue. Therein, it held that Section 73.213 applies only to existing short-spaced stations. When an allotment becomes vacant, Section 73.213 is no longer relevant or applicable.

The Commission, at paras. 15-16, further held that it is established practice to remove vacant allotments which do not meet the minimum spacing requirements, whenever the opportunity arises. According to the Commission, short-spaced channels are inefficient and the public interest is best served by not allowing them.

However, the vacant Westerville allotment does not have to be deleted because fully-spaced and technically suitable tower sites exist and are available. The problem here is that Davis and other applicants insist on using an existing tower which is 6.84 km. short-spaced. Davis insists that this use is permissible because the previous Westerville licensee, with which she has no privity, was "grandfathered" under Section 73.213. However, in view of John M. Salov, that rationalization has no merit and must be rejected.

WHEREFORE, in view of the foregoing, the application of Davis is impermissibly short-spaced and must accordingly be dismissed with prejudice.

Respectfully submitted,

MCNAIR LAW FIRM, P.A.

By: 

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January 25, 1993

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CERTIFICATE OF SERVICE

I, Stephen T. Yelverton, an attorney in the McNair Law Firm, P.A., do hereby certify that on this 25th day of January, 1993, I have caused to be hand-delivered or mailed, U.S. mail, postage prepaid, a copy of the foregoing "Supplement to Deny and Dismiss the Application of Shellee F. Davis" to the following:

Dennis Williams, Chief*
FM Branch
Room 332
Federal Communications Commission
Washington, D.C. 20554

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Stephen T. Yelverton

*Hand Delivery